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UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NATALIO PENEYRA and NATALIO  
PENEYRA, an Insane Person, by  
ADRIANO BORHA, His Guardian  
Ad Litem,

*Appellant,*

vs.

THE AMERICAN STEAMSHIP "KI-  
NAU," Her Engines, Machinery,  
Boilers, Tackle, Apparel, Boats, Fur-  
niture and Appurtenances, and IN-  
TER-ISLAND STEAM NAVIGA-  
TION COMPANY, LIMITED,  
Bailee, Claimant and Owner Thereof,

*Appellees.*

**BRIEF FOR APPELLANT**

*Upon Appeal from the District Court of the United  
States for the Territory of Hawaii to the United  
States Circuit Court of Appeals for the Ninth  
Circuit.*

**Filed**

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Clerk.

Attorney for Appellant

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STATEMENT OF THE CASE.

This case comes before this honorable Court on appeal from that certain final decree rendered against the appellant in the above entitled suit by the District Court of the United States for the District and Territory of Hawaii, the Honorable Horace W. Vaughan, United States District Judge, presiding on the hearing and who signed the decree on the 23rd day of May, A. D. 1918. This suit was brought by Natalio Peneyra, an insane person, by Adriano Borha, his guardian ad litem, against the American steamship "Kinau," her engines, etcetra, to recover damages for the

several breaches of the marine contract to land on board said steamship "Kinau" this libellant, Natalio Peneyra and to carry and convey the said libellant safely and without injury from the port of Nawiliwili, on the Island of Kauai, to the port of Honolulu on the Island of Oahu, as a first-class passenger. The libel, in substance, alleges that the libellant on or about the 19th day of December, A. D. 1917, applied to the duly authorized agent of the owners of the steamship "Kinau" for a first-class ticket as a passenger from the port of Nawiliwili, Kauai to the port of Honolulu, Oahu; and that he obtained said ticket from the said duly authorized agent of the owners of said steamship, and that the steamship "Kinau" was then lying at anchor in the harbor of Nawiliwili and was being run and operated as a passenger steamship between the port of Nawiliwili and the port of Honolulu aforesaid, and that after purchasing said first-class ticket and receiving the same, the libellant was taken in a small boat from the shore at Nawiliwili, run and operated by the owners of said steamship, and was taken out to said steamship "Kinau" then lying at anchor in the said harbor of Nawiliwili and was conducted on board of said steamship into the steerage quarters of said steamship instead of on to the deck of said steamship where the libellant was entitled under his ticket to be conducted. The libel further alleges that the hatch on the second deck of said vessel, to-wit: the steerage quarters was left open and unguarded and insufficiently lighted by the master and officers of the said steamship, and that the second officer of the said steamship ordered the libellant to remain in the steerage quarters of the said steamship, and that said libellant, without any fault on his part, suddenly stepped into a large and dangerous space from which the hatch had been re-

moved and left unguarded and unlighted, and that libellant fell down into the hold of said steamship, a distance of about fifteen feet and sustained severe and serious injuries to his head and other parts of his body, and that from said injuries occasioned by the negligence of the master and officers of said steamship, the libellant lost his reason and became insane and was sick and ill and suffered and underwent great pain of body and mind, and that after said libellant had sustained the injuries, he was taken up from the hold of said steamship and taken from and off of said steamship "Kinau" on shore at the port of Nawiliwili and placed in a hospital, and that subsequently, to-wit: on or about the 5th of January, 1918, under a commitment, the libellant was incarcerated in the Insane Asylum at Honolulu, where he remained for a period of four months, and was then discharged. It also appears that Adriano Borha, on the 29th of January, 1918, was duly appointed the guardian of this libellant by the Judge of the Circuit Court of the Fifth Judicial Circuit of the Territory of Hawaii, and that the said Adriano Borha upon the 16th day of March, A. D. 1918, was duly appointed as the guardian *ad litem* of the libellant in this suit by the Honorable Joseph B. Poindexter, Judge of the United States District Court for the Territory of Hawaii, and the libel was filed under an order of said judge and process in rem was issued against said steamship. The libellant claimed the sum of \$10,000.00 damages for the several breaches of the marine contract entered into between the libellant and the master and owners of said steamship "Kinau" and the obligations arising therefrom. The claimant filed an answer in this suit on the 5th of April, 1918, and admitted the allegations contained in paragraphs 1, 2 and 3 of said libel, and that the libellant

purchased a ticket for first-class passage on said steamship "Kinau" as alleged in the libel, and that libellant was carried and received on board said steamship, but denied that after the libellant was received on board said steamship he was taken or placed below the main deck, and denied that the second officer, or any officer or employee of said steamship told, required, or forced the libellant to go into the steerage, and/or/ pushed, shoved, or forced libellant in any manner or at all or at any place or time whatsoever or treated him in a rough or improper manner in any respect, and denied that it was dark on the second deck of said steamship, and in further answering paragraphs 1, 2, and 3 of the libel the claimant admits, "*that the said libellant while on the deck of said vessel fell into an open hatch into the hold of said vessel, a distance of about eight feet and struck his head on the floor or some object in said hold and sustained some injury the nature and extent whereof, claimant is ignorant*, and denied that the injuries were serious or permanent and denied that from the effects of the injuries the libellant lost his reason and became insane, and alleged that the hatch in which libellant fell was not improperly open or unguarded or improperly lighted, but that the hatch was open and in actual use at the time for the reception and deposit of freight and baggage, and that the premises around and near said hatch were fully and adequately lighted. By the second paragraph of the said answer, the claimant says that it has no knowledge sufficient to enable it to answer that the libellant was or is insane and requires proof thereof. By the third paragraph of the answer, the claimant further admits that it was a common carrier of freight and passengers by water within the jurisdiction of the Court. And by the fourth paragraph of the answer, the claimant de-

nies that by reason of the injury or injuries sustained by the libellant at the time alleged in said libel that the said libellant was damaged in the sum of \$10,000.00 or at all by reason of any act or fault of the claimant, and prayed that the libel may be dismissed with costs. (Apostles pp. 19, 20, and 21.)

At the close of the evidence for the libellant, on the 13th of May, 1918, the presiding judge, upon the statement, not under oath, of the libellant Natalio Peneyra, and two days after he had been discharged from the Insane Asylum, and disregarding all the testimony given upon the hearing, found that the suit should proceed in the name of the real party in interest, to-wit: Natalio Peneyra, and without further testimony as to the condition of Natalio Peneyra, and without the concurrence or action of the guardian *ad litem* or the counsel for the libellant duly appointed by Judge Poindexter as guardian *ad litem* and to conduct this suit, found that the libellant, Natalio Peneyra, had fully recovered and that the injuries sustained by the libellant were not caused by any negligence or failure of duty on the part of the steamship, its owners or officers, and that the libellant was not entitled to recover any damages on account of the injuries, and in accordance with this finding and opinion, thereafter, on the 23rd day of May, 1918, signed a decree dismissing the libel with costs. Judge Poindexter did not preside at the hearing of this suit for the reason that he was absent from the Territory when the suit was heard.

## II.

The findings and decree of the trial court are wholly unsupported by the evidence adduced upon the hearing, and the action of the court in ordering the suit to pro-

ceed in the name of Natalio Peneyra and that he had fully recovered his reason, without any application by the guardian *ad litem* or his counsel was and is wholly unwarranted, and unsupported by the law and the evidence, and it is not unjust criticism to contend that such action amounts to an anomaly and has no place in the regular and due course of the administration of justice in courts of admiralty. This suit was properly commenced by the duly appointed guardian *ad litem* of this insane person who was at the time of the appointment, in the Insane Asylum at Honolulu. The Court had power to make the appointment, and in support of the action of the Court I cite the case of King v. McLean Asylum of the Massachusetts General Hospital, 64 Fed. p. 331. Before discharging the guardian *ad litem*, under the evidence and circumstances disclosed on the hearing of this suit and especially as he did not appoint the guardian *ad litem*, the presiding judge should have required medical testimony as to the condition of the libellant, and he should have referred the matter to a master or have taken the evidence himself before rendering an opinion and taking the action that he did. A discharge from an insane asylum is at most only *prima facie* evidence of sanity. Aldrich v. Barton, 95 Pac. p. 900. See also Hovey v. Harmon, 49 Me. p. 269. Matter of Rogers, 5 N. J. Eq. p. 46. 10 Ency. Pl. & Pr. p. 1211. Lombard v. Morse, 155 Mass. p. 136.

It is contended that a discharge from an insane asylum made as recently as the discharge of Peneyra was made, before hearing his *ex parte* statements when not called as a witness and not under oath, simply means that Peneyra was allowed to go out of the Insane Asylum and be at large, and not that he had fully recovered his reason in order to conduct important litiga-



tion such as this suit. I cannot too strongly urge upon this appellate court that the learned trial judge erred in receiving the statement of Natalio Peneyra not under oath two days after he had been discharged from the Insane Asylum as to how and under what circumstances he sustained the injuries on board the steamship "Kinau" and that upon this statement he found him to be sane and without dismissing the guardian ad litem ordered the suit to proceed in the name of Natalio Peneyra, and disregarding the evidence taken on the hearing, found that the injuries of the said Natalio Peneyra were not caused by any negligence or failure of duty on the part of the steamship, its owners or officers, and that the libellant was not entitled to recover any damages on account of said injury. This finding was made notwithstanding that the answer of the claimant did not set up the defense of contributory negligence, and in this connection I cite from paragraph 1 of the claimant's answer,

"Further answering said paragraphs 1, 2, and 3, claimant admits that the said libellant, while on the second deck of said vessel fell into an open hatch into the hold of said vessel a distance of about eight feet and struck his head on the floor or some object in said hold and sustained some injury the nature and extent whereof claimant is ignorant, but upon information and belief claimant denies that said injuries were serious or permanent and denies that from the effects thereof the said Anatalio Pinira (meaning the libellant) lost his reason or became insane." (Apostles, p. 20.)

Nowhere in the answer does the claimant set up the defense of contributory negligence, and the action of the trial judge is not only not sustained by the pleadings nor the evidence given on the hearing.

## III.

The admission was made that the libellant did purchase a first-class ticket from the Inter-Island Steamship Company (meaning the claimant) for a first-class passage from Nawiliwili to the port of Honolulu.

“Mr. Davis: And Mr. Warren also admits that he did purchase a first-class ticket from the Inter-Island Steamship Company for that passage as alleged in the libel.

“The Court: All right, gentlemen.” (Apostles, p. 30.) It also appeared from the testimony of Adriano Borha, the guardian ad litem, that he conversed with the libellant while in the Insane Asylum of Honolulu and the libellant denied that he fell down any steamer.

“Q. And he asked you how this case was getting on? Just tell us as near as you can remember what the conversation was and what he said and what you said. A. I asked him whether he remembered when he fell down in the steamer, and he said he doesn't know anything, *and he said he never fell down in the steamer*, but he asked me whether I got his money, and I said, ‘Yes, I got your money. I put it in the bank.’” (Apostles, p. 32.)

The witness Henry Aki for the libellant, testified as follows, with reference to how the libellant got on board the said steamship:

“Q. How did he get on board? Just describe to the Court how he got on board, in your own language. A. There is a ladder there on the steamer that is lowered down where the passengers get on. He climbed up and went upstairs and went downstairs and got his luggage and he had a little girl along with him. I presume about five or six years old. And he went downstairs looking around for his luggage and as he goes around in the back by the

hatch where they load up some of the freight, that place was all open.

“Q. Yes, was it light? A. No, sir, it was dark.

“Q. Well, what happened to him? A. It was dark no passengers couldn't see it.

“Q. What happened to him? A. He fell down in the hold.

“Now, did you see anybody there ask him about his luggage? A. No, sir, but I see his ticket.

“Q. What kind of a ticket was it? A. He had a yellow ticket, first-class ticket.

“Q. And you saw that first-class ticket? A. Yes, sir.” (Apostles, pp. 35 and 36.)

This witness did not see the libellant actually fall into the hold, but he did see the libellant just before he fell and after he was brought up out of the hold.

“Q. After the man fell, who brought him up out of the hold? A. Two sailors down there. They lifted him up and then there was some other sailors alongside the hatch help pull him out.

“Q. I mean just describe his injuries that you saw there. A. I saw the injuries right on his head there; saw blood on there.

“Q. Well, just describe it to the Court more fully, will you? A. Right on top here, on the head there.

“Q. What kind was it? Was it a wound? A. Yes, blood coming out.” (Apostles, p. 39.)

Valentine Cabache, a disinterested witness, called by the libellant, testified as follows:

“Q. Who was it called your attention to it, do you know? A. A fellow by the name Pablo San-ches.

“Q. Was the man's head badly injured, do you know? A. I don't know, but it was covered with blood. His head was covered with blood.

“Q. As to his condition, it has been suggested, was Peneyra sensible or insensible after the accident? A. He was unconscious at the time he was taken from the hold.” (Apostles, p. 55.)

Pablo Sanches, a witness for the libellant, saw the libellant fall into the hold of this steamship, and he testified as follows:

“Mr. Davis: Where was Peneyra standing with reference to the hatch when the officers told him to step back? A. It’s about six feet far from the hatch.

“Q. How did he have his hand when he told him to move back? A. He kept his hand like that and said, ‘Move back, you fellows.’

“Q. Was Peneyra’s back to this hatch there? A. About two steps back then he fell inside the hatch.

“Q. Was his back to the hatch or his face? A. Back to the hatch.

“Q. And he did move back? A. He did move back about two feet backwards.

“Q. Did you hear any person order Peneyra to go down to the steerage? A. Yes, the second officer told him to go back because the second officer asked him if he knew how to talk English or can he understand what the officer said, and the officer told him to go down, and he went right straight down and carried his bag with him right where I stayed, and after that the officer told me to explain to all these boys that any passengers who had tickets must stay here and wait for purser.

“Q. He ordered him back. Was he trying to get upstairs then? A. No, he just moved back about two steps and fell inside the hatch.” (Apostles, p. 63.)

This witness further testified that it was awful dark,

and it was when the officer gave the command to move back that the libellant fell down the hatch.

“Q. Now, how was it there? Was it light or dark there? A. It was awful dark.

“Q. And it was when the officer gave the command to move back that he fell down the hatch? A. Yes, sir.

“Q. How far did he fall? What’s the distance as near as you can judge? How deep was it? A. I think it must be as high as this. I think from that side, I think—

“Q. How many feet? A. About sixteen or fifteen feet, I think.” (Apostles, p. 64.)

This witness further testified that the second officer of the steamship ordered the libellant to remain in the steerage.

“Mr. Davis: And who ordered this man Peneyra to stay there? A. The second officer.

“Q. Yes, and then he ordered him back? A. Yes, told him to move back.

“Q. And it was then that he fell? A. Yes, in the hold.” (Apostles, p. 65.)

This witness also testified as to the condition of the libellant after falling into the hold.

“Q. Were you present when the man was taken up out of the hold? A. Yes, I was present there.

“Q. Just describe his condition without any leading from me. How was he? A. From what I understand, he didn’t know anything. Just like dead. Blood coming out from his nose and mouth and from his ears and also from his head.

“Q. Was he conscious or unconscious? A. Unconscious. You know he didn’t know anything.

Couldn't talk and he couldn't do anything. Just like dead." (Apostles, p. 66.)

O. H. Otterson, the chief officer of the steamship "Kinau," a witness for the libellee, testified that at the time of the accident that the port side of the hatch was open and that there was no rope or chain up on that side of the hatch at the time of the accident.

"Q. I thought that was about it. Now we will suppose that this witness stand represents the hatch, see? Now, on the port side of the hatch there was a rope instead of a chain and that rope was down when you saw it? Mr. Warren: Object to that.

"Mr. Davis: I ask if it was a rope instead of a chain. A. Yes.

"Q. Now, the rope was down? A. Yes, because they were taking in cargo.

"Q. On the port side. A. Yes.

"Q. Now, which side of that hatch the man fell down, you don't know because you wasn't there? A. I wasn't there.

"Q. And you didn't see the accident? A. No. I didn't see the accident.

"Q. And the rope was down and the whole side was open at the time when you came down right after the accident? A. Yes, after the accident when I came down the rope was down." (Apostles, p. 165.)

It seems unnecessary to further quote testimony in order to demonstrate that the libellant, a first-class passenger, was ordered back in the steerage quarters towards the open hatch which was unguarded by any rope or chain and into which he fell and sustained the injuries as set out in the libel, and the preponderance of the evidence and the great weight of the evidence establishes beyond question the material allegations

of the libel and that the libellant fell into the open hatch and into the hold of the vessel by reason of the negligence and improper conduct of the second mate of this steamship, and that if he had been warned and if the sides of the hatch had been properly protected by chains or ropes and if the place had been sufficiently lighted, the accident would not have happened and the libellant would not have been injured, and the question involved is whether the appellee were guilty of negligence in ordering this first-class passenger to remain in the steerage and then ordering him to move back close to this unguarded open hatch into which he fell and suffered the injuries complained of.

(U. S. C. C. A. on an accident to a passenger, he being in the exercise of due care, the burden rests on the carrier to show that its whole duty was performed and that the injury was unavoidable by human foresight. *Midland Valley Railroad Co. v. Conner*, 217 Fed. p. 956, 133 C. C. A. 638.)

(Evidence held sufficient to raise a presumption of negligence and place the burden of proof upon the defendant. *Lcc Line Steamers v. Robinson*, 218 Fed. p. 559; 134 C. C. A. 287.)

In this case the doctrine of *res ipso loquitur* clearly applies because there were contractual relations between this passenger and the steamship and the happening of the accident and the injuries sustained by this appellant raises a presumption of negligence against the carrier. There is ample evidence of negligence in this case, and a violation of the contract between the carrier and the passenger. The carrier cannot escape under the evidence in this case, because the libellant was kept in the steerage quarters, was ordered back by the second officer of the steamship

towards this open hatchway and without any warning fell into the same and sustained the injuries from which he became insane and from which, according to the evidence he was still suffering on the hearing of this suit.

“When carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence; that the personal safety shall not be left to the sport of chance or the negligence of careless servants.” (Citing *R. R. Co. v. Zerbe*, 14 How. p. 468.)

Although the carrier does not warrant the safety of passengers, at all events, yet his undertaking and liability as to them go to the extent that he or his agents, where he acts by agents, shall possess competent skill and so far as human care and foresight can go, that he will transport them safely.

The carrier is required as to passengers to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise on his part of extraordinary diligence, aided by the highest skill. And this caution and diligence must necessarily be extended to all agencies or means employed by the carrier in the transportation of the passenger. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 455, 456; 26 L. Ed. 144.

It is further contended in this case, that the injury complained of is admitted by the answer, and the defense of contributory negligence has not even been set up, and the burden of proof is cast upon the defense to show affirmatively the matters of justification



or defense set up. *Tredwell v. Joseph*, Fed. Cas. 14157; *The Rhode Island*, Fed. Cas. 11745. See also *Caldwell v. New Jersey Steamship Co.*, 47 N. Y. 282; *Indiana Union Traction Co. v. Scribner*, 93 N. E. 1014, 1021; *LeBlanc v. Sweet*, 31 So. 766, 107 La. 355.

This appellate court, while not a court of general equity, nor has it the characteristic powers of a court of equity, but it is bound by its nature and constitution to determine the cases submitted to it upon equitable principles and according to the rules of natural justice. The material allegations of this libel were proven by preponderance of the evidence, and all the evidence was produced, and all those who knew anything about the happening of this accident testified. And the evidence on the part of the libellant discloses negligence and improper conduct on the part of the claimant of this steamship of the grossest kind and character, and a violation of the obligations arising from the marine contract entered into between it and this libellant. And the nature and extent of his injuries fully justify the entering of a decree, for, it is contended, the full amount claimed in the libel. At all events for such damages as will compensate this libellant for the time he lost, for the pain and suffering that he endured, his wounds causing his insanity and in consequence of which he spent four months in an insane asylum away from his little girl, and was prevented from proceeding on his journey to his home in the Philippine Archipelago with the little savings that he had accumulated from the servile labor which he performed under plantation managers on the Island of Kauai, he having accumulated considerable money, which shows the character of the man, and the trial judge should have taken this into consideration before dismissing this libel in view of all the evidence

adduced before him upon the hearing. This case must appeal and appeal strongly to the consideration of this appellate court, because of the serious nature of the injuries sustained by this libellant, who, although a Filipino and a plantation laborer, was and is entitled to the full protection of our laws, and that when he purchased a first-class ticket he was entitled to the same care and consideration by this steamship company and common carrier that any other passenger, no matter what his nationality might be, was entitled to receive, and a failure of the servants of this company, who knew this hatch was open and unguarded, together with the happening of this accident and under the evidence adduced, it was the plain duty of the trial court to have awarded this libellant substantial damages. The assignments of error filed herein are full and complete. The guardian has appealed, and the libellant, Natalio Peneyra, has also appealed from the final decree entered herein so that there can be no question that the appeal shall be considered on its merits, and that free from technicalities, the real party in interest, Natalio Peneyra, the libellant, shall receive substantial justice on appeal in admiralty, and that the decree of the United States District Court rendered by Judge Vaughan should for all the reasons herein stated be reversed with costs.

Respectfully submitted,

GEO. A. DAVIS,  
Counsel for appellant.

Dated at Honolulu, T. H., this 28th day of December, 1918.